

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BENJAMIN W. MITCHELL, JR.,

07 Civ. 8268 (PKC)

Plaintiff,

-v-

PRISON HEALTH SERVICES, INC., ROBERT
DE GUZMAN, M.D., Official Capacity, MS.
DAVIS, Nurse, MS. BAPTISTE, RN, Official
Capacity,

Defendants.

-----X

**DECLARATION OF
PAUL STUART
HABERMAN IN
SUPPORT OF
DEFENDANTS'
MOTION TO
DISMISS**

PAUL STUART HABERMAN declares, under the penalty of perjury, as
follows:

1. I am an associate of the law firm of HEIDELL, PITTONI, MURPHY & BACH, LLP, Trial Counsel for the Defendants in the above-captioned matter. As such, I am fully familiar with all of the proceedings had herein and submit this declaration in support of The Defendants' motion for dismissal of the Plaintiff's Amended Complaint, pursuant to Federal Rules of Civil Procedure Rule 12 (b) (6), on the ground that plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983, or in the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure Rule 56, on the ground that on this record there are no triable issues of fact.

2. Annexed hereto as Exhibits are documents which are relied upon and cited in the Defendants' Memorandum of Law accompanying this motion:

A. A New York Department of Correctional Services Inmate
Information print out regarding the status of the Plaintiff;

- B. A copy of the Summons and Complaint, dated January 14, 2008;
- C. A copy of the Correctional Health Services Progress Notes that were annexed to the Plaintiff's Amended Summons and Complaint as an un-numbered;
- D. A copy of the "Grievance" dated May 23, 2007 and annexed to the Plaintiff's Summons and Complaint as an un-numbered exhibit.
- E. A copy of the Plaintiff's Follow-Up/Consultation history from Correctional Health Services that was annexed to the Plaintiff's Summons and Complaint as Exhibits E and D.
- F. Copy of the Court's endorsed letter addressed to Judge P. Kevin Castel from Paul Stuart Haberman dated June 12, 2008 requesting a pre-motion conference and endorsed by Judge P. Kevin Castel on June 18, 2008

3. Our review of the above-referenced Complaint indicated that the within motion to dismiss was warranted. As such, we requested a pre-motion conference and were granted permission to move to dismiss without a pre-motion conference. Copies of the referenced correspondence are attached hereto as Exhibit F.

4. While Plaintiff alleges that the Defendants engaged in certain actions, these alleged acts do not rise to the level of deliberate indifference to his medical needs and medical malpractice.

5. In light of the foregoing facts, this Court should dismiss the Plaintiff's Complaint.

6. As set forth in Defendants' Memorandum of Law dated July 18, 2008, the Defendants are entitled to dismissal of the Complaint in its entirety, pursuant to Federal Rules of Civil Procedure Rule 12 (b) (6), on the ground that the Plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983, or in the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure Rule 56, on the ground that on this record there are no triable issues of fact.

Dated: New York, New York
July 18, 2008

HEIDELL, PITTONI, MURPHY & BACH, LLP

By: 

PAUL STUART HABERMAN (PH2771)
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